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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~809~~ 86

MICHIGAN WISCONSIN PIPE LINE COMPANY,
Appellant,
VERSUS
CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PHILLIPS PETROLEUM COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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May, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 8-8780

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STATEMENT

In its motion appellee, Corporation Commission of the State of Oklahoma, recognizes the price fixing order of the Corporation Commission for what it is—an attempt by the State of Oklahoma to regulate the price of "sales" of natural gas. No question as to the applicability of the "production and gathering" exception contained in the Natural Gas Act is raised. In such circumstances, the question presented by this appeal is whether the Supreme Court of Oklahoma, in purporting to carry out the mandate and

decree of this Court, imposed unwarranted restrictions thereon by limiting its reversal of the Commission's order to sales of residue gas, thereby leaving the order in effect in so far as sales of natural gas at or near the wellhead are concerned.

In this brief, we shall discuss in the order presented by appellee the points relied upon in support of the motion to dismiss.

I.

Appellant is aggrieved by the order of the Oklahoma Court, and there is a very real controversy involving a substantial federal question in which appellant has a justiciable interest.

The claim of appellee that Michigan Wisconsin is not "aggrieved" by the limitation in the Oklahoma Supreme Court's order of reversal is made moot by the fact that Phillips Petroleum Company has now filed its appeal in this Court from that order (No. 954, October Term, 1956). Since Michigan Wisconsin is properly named as an appellee in that appeal, it is a proper party before this Court in any event. Whether its contentions are presented as an appellant in this case or as an appellee in No. 954 is unimportant. There is no question in either event that the issues raised are properly before the Court, and that Michigan Wisconsin is a proper party.

It is perfectly clear, moreover, that Michigan Wisconsin is aggrieved by action of the Supreme Court of Oklahoma. It was pointed out in Michigan Wisconsin's Jurisdictional Statement that if the wellhead portion of the

order were upheld, Phillips might cancel its contracts with certain producers, thereby depriving Michigan Wisconsin of important gas supplies. Appellee argues that Phillips may not abandon service to Michigan Wisconsin without Federal Power Commission approval. It is quite true that a natural gas company such as Phillips cannot abandon service of gas which it has available for sale. But if Phillips cancels its contracts with the producers from which it purchases at the wellhead, as it clearly has power to do, such gas would not be available for sale to Michigan Wisconsin, and the Federal Power Commission would be powerless to require Phillips to maintain its present rate of deliveries. Thus, the threat of reduction in its gas supply makes Michigan Wisconsin an intensely interested party in this litigation.

Nor does appellee successfully meet the further point that, if the price Phillips must pay to producers is artificially increased by the Oklahoma Corporation Commission, that increase will ultimately be passed on to Michigan Wisconsin. While Phillips may not unilaterally increase its contract price to Michigan Wisconsin, the Federal Power Commission, in determining Phillips' just and reasonable rates, might take into account the actual cost to Phillips of its gas purchases. Thus, whenever Phillips' rates are determined by the Federal Power Commission, the minimum price fixed by the Oklahoma Commission could become an element in the rate which Michigan Wisconsin must pay.

The claim that Michigan Wisconsin is not aggrieved by the order here sought to be reviewed is thus without the

slightest merit. Cf. *Columbia Broadcasting System, Inc.* v. *United States*, 316 U.S. 407; *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470. Its interests are directly and vitally affected.

II.

Appellant timely and properly raised the question as to wellhead sales and the final order of the Oklahoma Court passed thereon.

It is not contended that appellant did not, after receipt by the Oklahoma court of the mandate of this Court, timely and properly urge that the decision in this case adjudicated the invalidity of the Commission order with respect to wellhead sales of natural gas made in interstate commerce. At the first opportunity, appellant filed its motion in the Oklahoma court in which it prayed "that a proper order be entered herein reversing, setting aside and vacating Order No. 26096 of the Corporation Commission of the State of Oklahoma * * *."

Appellee argues that the question of the validity of the wellhead portion of the State Commission's order was not involved in Michigan Wisconsin's first appeal and was not passed on by this Court in *Natural Gas Pipeline Co. of America* v. *Corporation Commission*, 349 U.S. 44. While it is true that the factual situation presented in the *Natural Gas Pipeline* case and by Michigan Wisconsin on its appeal involved sales of residue gas after gathering and processing had been completed, the principal question presented and the only question decided by this Court—was whether sales of natural gas in interstate commerce for resale are

proper subjects of state regulation. This Court held that, because such sales are subject to Federal Power Commission jurisdiction under the Natural Gas Act, State minimum price regulations affecting those sales are invalid.

This Court made absolutely no differentiation between sales at the wellhead and sales after gathering and processing. On the contrary, the opinion in the *Natural Gas Pipeline* case refers to this Court's decision in the *Phillips* case, which stated with reference to the effect of the Natural Gas Act:

> "* * * The legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of *all wholesales* of natural gas in interstate commerce and whether occurring before, during or after transmission by an interstate pipe line company" (Emphasis supplied).

The fact that this Court saw no distinction between wellhead sales and sales at the conclusion of gathering and processing, as long as such sales were sales in interstate commerce for resale, was made clear in a manner of unique significance here. For the Court distinguished *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, which had originally upheld State minimum price regulation of wellhead sales, *solely* on the ground that in that case the Court was "dealing with constitutional questions and not the construction of the Natural Gas Act, 15 U.S.C., Sec. 717 *et seq.*" 349 U.S. at 45.

This again illustrates the fact that this Court was not concerned with where, as a physical proposition, the sale

of gas took place. If the sale is (1) in interstate commerce (2) for resale, the Natural Gas Act applies according to its specific terms. This Court had held in the *Phillips* case that the Act means exactly what it says. Thus, the circumstance that the sales involved in the *Natural Gas Pipeline* and *Michigan Wisconsin* cases were made after gathering and processing was of no consequence. The principle applied by this Court extends equally to wellhead sales.

The fact that this Court will act to implement its mandate in cases of this kind is well illustrated by *Chas. Wolff Packing Co.* v. *Court of Industrial Relations of Kansas*, 267 U.S. 552. There, an appeal was taken to this Court from the Supreme Court of Kansas in a case involving the validity of an order entered by the Court of Industrial Relations of the State of Kansas. This Court's opinion was confined to one feature of the Act, and the judgment of the Kansas court was reversed with directions for further proceedings not inconsistent with the opinion. On rehearing the Kansas court rendered a judgment holding the provisions of the Act specifically considered by the Court invalid, but ordering enforcement of others. On a second appeal to this Court, both parties relied upon the former decision of this Court. The contentions were summarized as follows:

> "One insists that by reversing the original judgment of the state court and not merely a part of it, we adjudged the invalidity of the entire Act, and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor, we impliedly held the latter valid."

Concerning them, the Court said, "Both contentions are wrong." In upholding another contention by the company, the nature of which is reflected by the opinion, the Court said:

> "The company next contends that the decision, even though not in terms determining the question of the validity of the provisions permitting the fixing of hours of labor, recognized and gave effect to principles which are applicable to that question, and if applied, will solve it. A survey of the Act and of the decision will show that this contention is well taken."

With respect to the Act itself and the effect of the former decision, this Court said:

> "When the case was first here, the question chiefly agitated and therefore discussed and decided was whether the authority to fix wages as an incident of the compulsory arbitration could be applied to a business like that of the Wolff Company consistently with the protection which the due process clause of the 14th Amendment affords to the liberty of contract and rights of property. The question was answered in the negative, and the Act was held invalid in so far as it gives that authority. The subject was much considered and the principles which were recognized and applied were distinctly stated.
>
> * * * * * * * * *
>
> "The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system, it shares the invalidity of the whole.

* * * * * * * * *

"It follows that the state court should have declined to give effect to any part of the order of the state agency."

There principles, we submit, find exact analogy in the present case.

Appellee's claim that other cases more properly present the question of the validity of State regulation of wellhead sales is subject to several difficulties. In the first place, this is an appeal, not certiorari, and a substantial federal question is presented. Second, the alleged distinction between wellhead sales and sales after gathering and processing has already been held by this Court to be unimportant. Third, and most important, appellee neglects to state that another case involving the precise question is now before this Court. *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, No. 797, October Term, 1956. There is no reason whatever why these cases should not be considered and decided together. Proper judicial administration would permit no other practice.*

III.

There is no adequate non-federal basis on which the order of the Oklahoma Court can rest.

Whether the wellhead portion of the order of the Corporation Commission be separable from the remainder of the order or not, it is clearly in conflict with the provi-

* The cases cited by appellee at page 11 of its motion do not even involve state regulation of wellhead sales but concern details of Federal Power Commission regulation of such sales.

sions of the Natural Gas Act, as interpreted and construed by this Court in the *Phillips* case, in which this Court, as it had done in *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682:

> "* * * refused to rely on such refinements and instead based its decision in Interstate on the broader ground that sales in interstate commerce for resale by producers to interstate pipe line companies do not come within the 'production or gathering' exemption. 347 U.S. at 680-681."

The conflict between the jurisdiction conferred upon the Federal Power Commission by the Natural Gas Act and the asserted right of states to regulate sales of natural gas in interstate commerce and the necessity of resolving it has been recognized by this Court in every case in which it has been called to its attention. The only real question is therefore whether, if it has not already done so, the Court will resolve it in this case. It is respectfully suggested that there will be no better time than now and no better case in which to do it than in this.

CONCLUSION

Appellant submits that this case should be disposed of upon its merits, along with others in which the same question is or will be presented, and that only by so doing can

appellant be protected from serious injury which would otherwise result.

Respectfully submitted,

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